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Supreme Court, U.S.
FILED

09-348 SEP 18 2009

OFFICE OF THE CLERK
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No.

IN THE

Supreme Court of the United States

TRADIN ORGANICS USA, INC.,
Plaintiff-Appellant,

- against -

MARYLAND CASUALTY COMPANY,
Defendant-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was it proper and appropriate for the United States Court of Appeals for the Second Circuit to Affirm a Judgment of The United States District Court for the Southern District of New York that completely misinterpreted the wording in a Commercial General Liability Policy as to the Occurrence that triggered coverage and misapplied an inapplicable Exclusion in the Policy that was not involved in the loss?

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PETITION FOR A WRIT OF CERTIORARI

Tradin Organics USA, Inc. ("Tradin USA") respectfully petitions for a Writ of Certiorari to review the Opinion and Judgment of The United States Court of Appeals for the Second Circuit

RULE 29.6 STATEMENT

Plaintiff-Appellant, Tradin Organics USA, Inc. is a wholly owned subsidiary of Tradin Organic Agriculture B.V., Amsterdam, The Netherlands, which is a privately held corporation.

OPINIONS BELOW

The Summary Order of The United States Court of Appeals for the Second Circuit dated April 16, 2009 was unpublished and not officially reported. It may be found in 2009 U.S. App. LEXIS 7918 and is reproduced herein at Appendix A.

The Memorandum Decision and Order of The United States District Court for the Southern District of New York dated January 29, 2008 wherein the Court granted the Motion of Defendant, Maryland Casualty Company ("Maryland") for Summary Judgment and Ordered the action dismissed was unpublished and not officially reported. It may be found in 2008 U.S. Dist. LEXIS 5820 and is reproduced herein at Appendix B .The Order of The United States Court of Appeals denying the Petition or a Rehearing *En Banc* is reproduced herein at Appendix C.

JURISDICTION

The Summary Order of The United States Court of Appeals for the Second Circuit, that affirmed the Judgment of The United States District Court for the Southern District of New York, was entered on April 16, 2009. Plaintiff-Appellant timely filed a Petition for a Rehearing *En Banc* which was denied on June 22, 2009. This Petition is timely under 28 U.S.C. § 2101(c) and under Supreme Court Rule 13 because it is filed within 90 days of the Denial of Rehearing. This Court, therefore, has jurisdiction to review the Judgment of The United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

In July, 2003 Tradin USA entered into a contract with Crofters Food Ltd. of Parry Sound, Ontario, Canada ("Crofters") wherein Crofters agreed to purchase from Tradin USA various food products, including Raspberry Crumble, Blackberry Confiture, Sour Cherry, Apricot Halves, and Black Currant. To fulfill its contract, Tradin USA turned to a subcontractor with whom it had dealt on many previous occasions, Den Juro, a company located in Beograd, Serbia. The order was placed for Tradin USA by its parent, Tradin Organic Agriculture B.V., Amsterdam, The Netherlands. ("B.V."). Den Juro prepared the foodstuffs called for by the Crofters-Tradin USA contract and shipped them through B.V. to Tradin USA as interim consignee, and thence to Crofters; The shipment consisted *inter alia* of five (5) containers with the Raspberry Crumble being packed in 2000 cartons.

After the shipment was delivered to Crofters, it was found that the Raspberry Crumble was contaminated with a number of foreign objects, including plastic, pits, cherry stems, glass and other materials. As a result, the Canadian Government ordered a general recall of all of the Raspberry Crumble that Den Juro had shipped to Crofters. The evidence in the Record (including Survey Reports) is clear that the contamination of the Raspberry Crumble occurred accidentally while these foodstuffs were being prepared by Den Juro and that the Raspberry Crumble was shipped by Tradin USA's subcontractor in a contaminated state. In due course, Crofters asserted a claim against Tradin USA for its loss.

Prior to the contract that Tradin USA had entered into with Crofters, it had obtained on April 17, 2003 a Comprehensive General Liability Policy from Maryland with limits of $ 1,000,000 each loss. Such coverage, which will be described in more detail in this Petition, included the agreement to pay those sums that the insured becomes legally liable to pay because of " Property Damage." The Policy contained various Exclusions, including:

> " k. Damage To Your Product
>
> ' Property damage' to 'your product' arising out of it or any part of it"
>
> and
>
> " Damage To Your Work
> 'Property damage to 'your work' arising out of it or any part of it and included in the products completed operations hazard."

The Policy defined 'Your Work" *inter alia* as:

> "a. Work or operations performed by you or on your behalf, and
>
> b. Materials, parts or equipment furnished in connection with such work or operations.

However, the Policy provided that with respect to the " Your Work" Exclusion the following:

> "This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor ."

Suffice it to say, Tradin USA gave notice under the Policy to Maryland of the Claim asserted by Crofters arising out of the contamination of the Raspberry Crumble. On May 11, 2004, after having the Claim in hand less than 24 hours, Maryland (Zurich) wrote a letter which, in effect, denied liability under the Policy. In said letter, while quoting the "Your Product" and "Your Work" Exclusions, the insurer omitted any reference to the clause quoted above that the Exclusion does not apply if the work is done by a subcontractor.

Tradin USA subsequently settled the Claim with Crofters and incurred a loss of $ 214,444.32. Tradin USA thereafter commenced the instant action on July 20,2006 wherein the Complaint asserted two causes of action; one for Tradin USA's loss of $214,444.32 and a second for $643,333.02, based upon treble damages for the bad faith denial of liability.

Point I
The Court Of Appeals And The District Court Herein Completely Misinterpreted The Wording Of The Policy In Question

In considering this Case, The United States District Court for The Southern District of New York and the United States Court of Appeals for the Second Circuit completely misinterpreted the wording of the Policy issued by Maryland to Tradin USA.

It is clear from the record that the contamination of the Raspberry Crumble in question occurred while it was in the possession of Den Juro in Serbia, the subcontractor of Tradin USA, before it was shipped to Crofters and that there was "Damage to Your Work" at that time. As stated above, the Record in this case, which includes the Report of a Surveyor, is clear that the contamination occurred accidentally while the Raspberry Crumble was in the possession of the subcontractor, Den Juro. The Maryland Policy defined "Occurrence" as follows:

> '13. Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'

The two Courts below, however, held , in effect, that the "occurrence" arose when the contaminated Raspberry Crumble was delivered to Crofters and that, accordingly, the "Damage to Your Product" Exclusion applied. In a case-that is very similar to the instant case, The Supreme Court of The State of Minnesota held that there was coverage under a Comprehensive General Liability Policy. *Wanzek Construction, Inc. v.*

Employers Insurance of Wausau, 679 N.W. 2d 322, 2004 Minn. LEXIS 235 (2004). Wanzek was the general contractor for the construction of a municipal swimming pool. It incurred costs to replace coping stones that were manufactured by Aquatic Designs, Inc. Those stones were pre cast and used to cover perimeter overflow. After the pool was completed and used by the public, a number of persons were injured by falling onto the coping stones which had become cracked. The City demanded that Wanzek replace the stones. Wanzek made a similar demand upon Aquatic, but the latter fled for bankruptcy and Wanzek was forced to replace the stones at a cost of $ 164,162.24.

Wanzek filed a claim under its CGL Policy with Wausau, but the insurer denied liability contending that the policy did not cover the cost of remedying defects in workmanship because the Exclusion in the Policy for damage to " Your Work " precluded coverage. The lower court granted the insurer's Motion far Summary Judgment, but the Appellate Court reversed and held there was coverage. On Appeal, The Supreme Court of Minnesota affirmed the Appellate Court holding that the claim was covered under the CGL Policy. The insurer, Wausau, had argued that if a material supplier like Aquatic to qualify as a subcontractor, coverage will be awarded for the failure of almost all materials supplied to a construction project. At oral argument, Wanzek took a position at the other extreme by proposing that all material suppliers, except those merely providing materials "off the shelf' should be considered subcontractors .

The Supreme Court, in finding for Wanzek, said at p. 329:

> " If the policy language is ambiguous, it must be interpreted in favor of finding coverage. *Nordby*, 329 N.W. 2d at 822. Because there is no statutory or regulatory definition of subcontractor that is incorporated into the "your work" exclusion and the policy does not define the term, we hold that the term "subcontractor" in the exception to the "your work" exclusion of the CGL insurance policy is ambiguous and we will construe it liberally in favor of coverage. In that context, we need not reach Wanzek's proposed definition that would include all material suppliers except those who provide 'off the shelf' materials because the facts in this record satisfy an even narrower definition. We hold that where, as here, a supplier custom fabricates the materials to the owner's specifications and provides on-site services in connection with the installation, the supplier meets the definition of subcontractor under the exception to the "your works" exclusion."

In the same vein as the *Wanzek* Case, the supplier of Tradin USA (Den Juro) fabricated the Raspberry Crumble pursuant to contract and clearly met the definition of "subcontractor" under the exception to the "your works" exclusion. See also: *Fidelity & Deposit Company of Maryland v. Hartford*

Casualty Insurance Company, 189 F. Supp.2d 1212, 2002 U.S. Dist. LEXIS 3839 (U.S. Dist. Ct., Kansas) where the Court held that deteriorating walls and other damages to a project constituted an "Occurence" and that the "Your Work" exclusion was inapplicable.

Point II
The Holding By The District Court That The Your Product Exclusion Applies And That The Exception To The Your Work Exclusion Is Irrelevant Was Completely Erroneous.

In the Opinion of The United States District Court in this Case at page 6, the Court stated as follows:

> "Because the Your Product Exclusion applies, Tradin's argument that recovery is not precluded by the Your Work Exclusion is irrelevant. The Policy unambiguously allows Tradin (sic) to deny coverage if any one of sixteen exclusions applies."

The "occurrence" in this case that gave rise to the loss was the contamination of the Raspberry Crumble by Tradin USA's subcontractor, Den Juro, in Serbia, long before the Raspberry Crumble was delivered to Crofters. Thus, the loss that occurred was to "Your Work" (See: *Fidelity & Deposit Company of Maryland v. Hartford Casualty Insurance Company Supra,)* and since such work was performed by a subcontractor, the loss was not excluded by the Policy. The 'Your Product" Exclusion was not applicable

herein because the occurrence that gave rise to the loss did not take place when the "Product" was delivered to Crofters, but rather when the foodstuff was contaminated in Serbia. In *Houseman Construction Company v. The Cincinnati Casualty Company*, 2009 U.S. Dist. LEXIS 62026 (W.D. Mich. July 14, 2009) the Court considered the question of policy coverage when there was a "your product" exclusion and a "your work" exclusion that conflicted on the issue of coverage. In finding in favor of the insured, the Court said:

> "The policy has a 'your product' exclusion, but it is inapplicable because the policy defines 'your product' to exclude real property. The policy's 'your work' exclusion is similar, although 'your work' does not exclude real property. However, in contrast with the exclusions in the policies in *Vector* and *Radenbaugh* as well as the Policy's "your product' exclusion, the Policy's 'your work' exclusion expressly excepts from the exclusion damage to the contractor's work product performed by or caused by the work of a subcontractor. This exception suggests that the Policy intended to cover at least some instances of damage to the contractor's work caused by a subcontractor's poor workmanship. In the court's judgment, the subcontractor exception to the 'your work' exclusion creates ambiguity regarding whether damage, caused by a subcontractor's deficient workmanship and confined to the contractor's work product constitutes

> an 'occurrence' within the meaning of the Policy. This ambiguity must be resolved In favor of the insured."

The foregoing cases make it clear that the District Court's holding in this case, which was affirmed by the Second Circuit, that the exception to the "your work" exclusion was irrelevant, was completely erroneous.

CONCLUSION

Given the fact that the District Court and the Court of Appeals below completely misinterpreted the wording of the Comprehensive General Liability Policy issued by Maryland to Tradin USA, this Court should grant Certiorari, reverse the Lower Court Judgment and send the Case back to the District Court; for a trial on damages. If this Case is allowed to stand, the completely erroneous reasoning therein will adversely affect many future actions.

Respectfully Submitted,

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Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

TRADIN ORGANICS USA, INC.,

Plaintiff,

-against-

MARYLAND CASUALTY COMPANY,

Defendant.
----------X

06 Civ. 5494 (WHP)
MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff Tradin Organics USA, Inc. ("Tradin"), a New Hampshire corporation, brings this breach of contract action against Defendant Maryland Casualty Company ("Maryland"), a Maryland corporation, after Maryland denied Tradin coverage for losses associated with a government recall of its raspberry crumble. Both parties move for summary judgment. For the following reasons, Maryland's motion for summary judgment is granted, and the action is dismissed.

BACKGROUND

In July 2003, Canada-based Crofters Food Ltd. ("Crofters") purchased eighty metric tons of raspberry crumble from Tradin (the "Crumble"). (Declaration of Steven I. Lewbel dated Nov. 26, 2007 ("Second Lewbel Decl.") Ex. H: Sales Contract dated July 21, 2003.) To

fulfill the order, Tradin's parent in Amsterdam, Tradin Organic Agriculture B.V. ("Tradin BV"), contracted with Den Juro, a Serbian company. (Second Lewbel Decl. Exs. E, F: Sales Contracts between Den Juro and Tradin BV dated Sept. 30, 2003 and Oct. 3, 2003, Invoice Nos. 20031287, 20031149.) Tradin BV's contract with Den Juro provided for Den Juro to ship the Crumble directly to Crofters. (Second Lewbel Decl. Ex N: Transcript of Stephen Snyder Deposition dated Feb. 2, 2007 at 39-40.) After Crofters accepted delivery, the Crumble was discovered to contain plastic, pits, cherry stems, glass and other materials, and the Canadian government ordered it recalled. (Affidavit of Vipon Kumar dated Nov. 21, 2007 ("Kumar Aff.") ¶ 4; Second Lewbel Decl. Ex. I: Letter from Steve Snyder to Lloyd Butler dated Apr. 14, 2004 at 2.) Tradin agreed to compensate Crofters $214,444.32 for the contaminated Crumble (the "Settlement"). (Kumar Aff. ¶7.)

Tradin filed an insurance claim with Maryland to recover the costs of the Settlement under Precision Portfolio Policy No. 35242205 (the "Policy"), which included commercial general liability coverage. (Kumar Aff. ¶ 6; Declaration of Steven I. Lewbel dated Dec. 14, 2007 ("Lewbel Decl.") Ex. C: Insurance Policy at MAR003.) Maryland had issued the Policy to Tradin, effective April 2004, through a New Hampshire-based insurance broker. (Lewbel Decl. Ex. C at MAR003, MAR071.) The Policy contains no choice-of-law provision.

Under the Policy, Maryland covers Tradin for "those sums that [Tradin] becomes legally obligated to pay as damages because of. . . 'property damage' to which this insurance applies." (Lewbel Decl. Ex. C at MAR006.) The Policy excludes from coverage any

property damage due to "'your product' arising out of it or any part of it" (the "Your Product Exclusion"). "[Y]our product" includes "any goods or products... manufactured, sold, handled, distributed or disposed of by" Tradin. (Lewbel Decl. Ex. C at MAR021.) The Policy also contains an exclusion for damages caused by "your work," which is defined as "[w]ork or operations performed by [Tradin] or on [Tradin's] behalf and "[m]aterials, parts or equipment furnished in connection with such work or operations" (the "Your Work Exclusion"). (Lewbel Decl. Ex. C at MAR010, MAR021.) However, the Your Work Exclusion "does not apply if the damaged work or the work out of which the damage arises was performed on [Tradin's] behalf by a subcontractor." (Lewbel Decl. Ex. Cat MAR010.)

By letter dated May 11, 2004, Maryland rejected Tradin's claim, citing the Your Product Exclusion. (Kumar Aff. ¶ 6, Ex. A: Letter from John D'Amico to Stephen E. Snyder at 1.) Tradin claims it has a right to full reimbursement of the Settlement. (Complaint dated July 19, 2006 ("Compl.") ¶ 18.) Tradin also seeks treble damages, alleging Maryland's decision to reject Tradin's claim was made "in bad faith." (Compl. ¶ 21.)

DISCUSSION

I. Legal Standard

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether there is a genuine issue as to any material fact, "[t]he evidence of the

non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 255 (1986). When the dispute hinges on contract interpretation, "summary judgment may be granted when [the contract's] words convey a definite and precise meaning absent any ambiguity." *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir.1992).

II. Choice of Law

A federal court in a diversity action must apply the choice-of-law rules of the forum state. *White v. ABCO Eng'g Corp.*, 221 F.3d 293, 301 (2d Cir. 2000). For contract disputes, New York courts consider "(1) any choice-of-law provision contained in the contract; (2) the place where the contract was negotiated, issued, and signed; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties." *Advani Enters., Inc. v. Underwriters at Lloyds of London*, 140 F.3d 157, 162 (2d Cir. 1998). "In the context of insurance contracts, New York courts also consider. . . `the location of the insured risk; the insured's principal place of business; where the policy was issued and delivered; the location of the broker or agent placing the policy; where the premiums were paid; and the insurer's place of business." *Schwartz v. Twin City Fire Ins. Co.*, 492 F. Supp. 2d 308, 317 (S.D.N.Y. 2007) (quoting Restatement (Second) of Conflict of Laws § 193). "[W]here liability insurance contracts are concerned, the applicable law is `the local law of the state which the parties understood was to be the principal location of the insured risk unless with respect to the particular issue, some other state has a

more significant relationship ... to the transaction and the parties." *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 319 (N.Y. 1994) (quoting Restatement (Second) § 193).

The Policy, which contains no choice-of-law provision, was issued to a New Hampshire agent on behalf of Tradin, a New Hampshire corporation. (Lewbel Decl. Ex. C at MAR071.) The parties offer no evidence about where Tradin's agent signed the Policy. (Transcript of oral argument dated Jan. 18, 2008 ("Tr.") at 15.). New Hampshire is Tradin's only place of business (Second Lewbel Decl. Ex N at 14), and therefore, the only place from which the premiums could have been paid. New Hampshire's substantive law therefore governs the Policy.

II. Breach of Contract

New Hampshire courts "generally construe an insurance policy as [they] do any other contract." *Energynorth Natural Gas, Inc. v. Continental Ins. Co.*, 146 N.H. 156, 159 (N.H. 2001). A contract is ambiguous "when the contracting parties reasonably differ as to its meaning." *Behrens v. S.P. Constr. Co., Inc.*, 153 N.H. 498, 503 (N.H. 2006).

New Hampshire courts have not specifically interpreted "your work" and "your product" exclusions in insurance policies. In such situations—when the law of another state is unsettled—New York courts may presume that state's law would resemble New York's, but must also examine the law of that state and other states. *Rogers v. Grimaldi*, 875 F.2d 994, 1003 (2d Cir. 1989). New York courts, as well as courts in other jurisdictions, have held that similarly defined "your product" exclusions unambiguously preclude coverage for losses caused by a contaminated or defective

product sold by the insured. *Lowville Producer's Dairy Co-op., Inc. v. Am. Motorists Ins. Co.*, 198 A.D.2d 851, 852 (N.Y. Ct. App. 1993); *see also Hartog Rahal P'ship v. Am. Motorists Ins. Co.*, 359 F. Supp. 2d 331, 332-33 (S.D.N.Y. 2005) (granting summary judgment to insurance company denying coverage based on "your product" exclusion where insured's losses were caused by contaminated apple juice concentrate it sold). *See also Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Liberty Mut. Ins.*, 234 Fed. Appx. 190, (5th Cir. 2007) (interpreting Louisiana law); *Modern Equipment Co. v. Cont'l Western Ins. Co., Inc.*, 355 F.3d 1125, 1129, 1131 (8th Cir. 2004) (interpreting Iowa law); *United Capitol Ins. Co. v. SpecialTrucks, Inc.*, 918 F. Supp. 1250, 1255-57 (N.D. Ind. 1996) (interpreting Indiana law).

Moreover, the plain language of the contract supports this interpretation, as the Policy explicitly defines "your product" as "any goods or products ... manufactured, sold, handled, distributed or disposed of by" Tradin or others using Tradin's name. (Lewbel Decl. Ex. C at 19.) It is undisputed that Tradin "sold" the food to Crofters. (Tr. at 2.) Because the Your Product Exclusion applies, Tradin's argument that recovery is not precluded by the Your Work Exclusion is irrelevant. The Policy unambiguously allows Tradin to deny coverage if any one of sixteen exclusions applies. (Lewbel Decl. Ex. C at MAR007-MARO11.) Maryland's motion for summary judgment on Tradin's contract claim is therefore granted, and Tradin's motion for summary judgment on its contract claim is denied.

III. Bad Faith

New Hampshire courts recognize a "bad faith" tort claim arising from breach of contract suits where

"the facts constituting the breach of the contract also constitute a breach of a duty owed by the defendant to the plaintiff independent of the contract." *Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 613 (N.H. 1978). Tradin claims bad faith because (1) Maryland did not sufficiently investigate the claim before denying it, and (2) in its letter to Tradin denying coverage, Maryland did not refer to the exception for subcontractors in the Your Work Exclusion. Tradin has not identified any duty Maryland owed independent of its contractual duty. Moreover, because the facts in this case do not constitute a breach of contract, there can be no bad faith claim. The Court therefore grants summary judgment to Maryland on Tradin's bad faith claim as well.

CONCLUSION

For the foregoing reasons, Tradin's motion for summary judgment is denied and Maryland's motion for summary judgment is granted. The Clerk of the Court shall terminate all motions pending as of January 29, 2008 as moot and mark the case closed.

Dated: January 29, 2008
New York, New York

SO ORDERED:

/s/
WILLIAM H. PAULEY III
U.S.D.J.

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08-0853-cv
Tradin Organics USA, Inc. v. Maryland Casualty Company

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT' LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: " (SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2. USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER

OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of April, two thousand nine.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. JOSÉ A. CABRANES,
HON. SONIA SOTOMAYOR,
Circuit Judges.

----------X

Tradin Organics USA, Inc.,
Plaintiff-Appellant,

v. 08-0853-cv

Maryland Casualty Company,
Defendant-Appellee.

----------X

APPEARING FOR APPELLANT:

JOSEPH A. KILBOURN, Mount Kisco, New York.

APPEARING FOR APPELLEE:

STEVEN IRWIN LEWBEL, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Pauley, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Tradin Organics USA, Inc. ("Tradin") appeals from a judgment and order of the United States District Court for the Southern District of New York (Pauley, J.) denying its summary judgment motion and granting summary judgment to Defendant-Appellant Maryland Casualty Company ("Maryland") We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

"We review de novo the district court's grant of summary judgment, drawing all factual inferences in favor of the nonmoving party." *Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 107 (2d Cir. 2008).

[1] Exclusions like the "Your Product" exclusion here are "intended to exclude coverage for damage to the insured's product, but not for damage caused by the insured's product to persons or property other than the insured's own product." *Lowville Producer' Dairy Coop. v. Am. Motorists Ins. Co.*, 198 A.D.2d 851, 853, 604 N.Y.S.2d 421, 422 (4th Dep't 1993); *see also Hartog Rahal P'ship v. Am. Motorists Ins. Co.*, 359 F. Supp. 2d 331, 333 (S.D.N.Y. 2005). As such, "[t]he risk that [Tradin] would be required to make good on its warranty of quality was a contractual or commercial risk that [Maryland] did not intend to

insure." *Lowville*, 198 A.D.2d at 853, 604 N.Y.S.2d at 423. The policy provided by Maryland was "a liability policy, not a performance bond." *Id.* Because Tradin's claim was based on damage to Tradin's product -- a risk specifically excluded by the "Your Product" provision-- Maryland properly denied coverage of the claim.

[2] "Exclusions in policies of insurance must be read seriatim, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another." *Zandri Constr. Co. v. Firemen' Ins. Co. of Newark*, 81 A.D.2d 106, 109, 440 N.Y.S.2d 353, 356 (2d Dep't 1981) (citation omitted).

Since the "Your Product" exclusion clearly applied to bar coverage of Tradin' claim, it is irrelevant whether the "Your Work" exclusion--and/or its exception -- also applied. Coverage was already barred, the "Your Work" exclusion did not create an affirmative grant of coverage, and there was no ambiguity as to the contractual language.

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By:_____/s/_____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States- Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of June, two thousand and nine.

Docket Number: 08-0853 -cv

Tradin Organics USA, Inc.,
Plaintiff-Appellant,

V.

Maryland Casualty Company,
Defendant-Appellee.

Appellant, Tradin Organics USA, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is. denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

/s/
By: Frank Perez, Deputy Clerk

FILED JUNE 22, 2009

CORRECTED COPY

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(3)

Supreme Court, U.S.
FILED
OCT 21 2009
OFFICE OF THE CLERK

No. 09-348

IN THE

Supreme Court of the United States

TRADIN ORGANICS USA, INC.,

Plaintiff-Appellant,

- against -

MARYLAND CASUALTY COMPANY,

Defendant-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Has Petitioner Tradin Organics USA, Inc. ("Petitioner") presented compelling reasons to grant the Petition where the Second Circuit's affirmance of summary judgment to respondent Maryland Casualty Company ("Maryland") does not conflict with legal precedent or implicates an important federal question?

II. Has Petitioner presented compelling reasons to grant the Petition based on the legally flawed contention that all exclusions in an insurance policy must apply to deny coverage for a loss notwithstanding settled law that exclusions in an insurance policy must be read individually and not collectively?

III. Has Petitioner presented compelling reasons to grant the Petition where Petitioner has conceded that as the seller of the contaminated raspberry crumble, the "your product" exclusion in the Maryland policy applies to deny coverage for the loss?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Maryland Casualty Company certifies that Maryland Casualty Company is a wholly owned subsidiary of Zurich American Insurance Company, Schaumburg, Illinois, which is wholly owned by Zurich Holding Company of America. All are owned by Zurich Financial Services Group, a publicly traded corporation based in Zurich, Switzerland. Maryland Casualty Company has no subsidiaries of its own.

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INTRODUCTION

Petitioner Tradin Organics USA, Inc. ("Petitioner" or "Tradin") has presented no compelling reasons for this Court to grant the Petition for Writ of Certiorari. See Supreme Court Rule 10. Specifically, Tradin has failed to demonstrate that the Second Circuit's Summary Order dated April 16, 2009, is in conflict with a decision of this Court, another Court of Appeals, the Second Circuit or decided an important federal question not settled by this Court. See Supreme Court Rule 10(a) and (c). In fact, Petitioner, which does not cite to a single Court of Appeals decision in its Brief, let alone any precedent on point, has not even carried its less strenuous burden of showing any basis in law to consider the Petition.

Tradin's complaint sought $214,442.43 from its insurer Maryland for a loss incurred as a result of Tradin's sale of a defective product (raspberry crumble) to a third party Crofter's Food, Ltd. ("Crofter's"). Maryland denied coverage because loss fell squarely within the business risk exclusion in the Maryland policy (the "Maryland Policy") for losses arising from property damage to an insured's own product. The "your product" exclusion applied because Tradin was the undisputed seller of the contaminated raspberry crumble. Tradin acknowledges the "your product" exclusion bars coverage for the loss. Tradin contends it is entitled to coverage because the damages arose out of work performed by a subcontractor, Den Juro, and the claim therefore falls within the subcontractor exception to a separate "your work" exclusion in the Maryland Policy. Apart from the fact that Den Juro was not Tradin's subcontractor, Tradin's relationship

with Den Juro and the potential applicability of "your work" exclusion are irrelevant because coverage is in any event excluded under the "your product" exclusion.

On this Petition, Tradin has raised a new contention not raised below that because the contamination occurred when the product was in Den Juro's possession, the loss is subject to the subcontractor exception to the "your work" exclusion. Tradin's assertion that the timing of the contamination is somehow determinative of coverage is devoid of merit. Tradin cites not a single case which supports this dubious proposition, and none exists. No dispute exists that Tradin sold a contaminated product that required recall. That fact is dispositive as to the coverage. The purpose of Maryland's liability policy was to protect Tradin in the event its product caused damage to third parties. It is not a performance bond guarantying the quality of Tradin's product. Overwhelming case law throughout the country so holds.

Tradin's efforts to show ambiguity exists between the "your work" and "your product" exclusions is unsupported by any legal authority or the facts of this case. The two cases Tradin cites involved damage to a structure on land. The courts found the "your product" exclusion inapplicable because of the exception for "real property" within the "your product" exclusion. Undisputably, Tradin sold a damaged food product, not real property.

In continuing to deem Den Juro's status relevant, Tradin's Petition shows a complete misunderstanding of the policy's business risk exclusions and the law construing those exclusions. It is well settled that exclusions are to be read

individually, not collectively. If any one policy exclusion applies, coverage is not afforded. Tradin has conceded the "your product" exclusion applies. As a result, the predicates of the "your work" exclusion are of no consequence.

STATEMENT OF FACTS

A. The Sale of the Raspberry Crumble by Tradin to Crofter's

In July 2003, Crofter's Food, Ltd. and Tradin entered into a contract (the "Crofter's Contract") whereby Crofter's agreed to purchase certain organic foods including a product known as raspberry crumble. To fulfill the Crofter's Contract, Tradin's parent Tradin Organic Agriculture B/V ("B/V") purchased fruit products from a grower Den Juro, located in Beograd, Serbia. Tradin then purchased the raspberry crumble from B/V. Without question, B/V is not an insured under the Maryland Policy.

Tradin satisfied the Crofter's Contract and sold the raspberry crumble. The Crofter's Contract identifies Tradin as the seller and Crofter's as the buyer. Crofter's took possession of the raspberry crumble and sold it to various retail food establishments in Canada.

In or about March 2004, Crofter's learned the raspberry crumble was contaminated with foreign objects including glass and plastic. As a result, the Canadian government ordered Crofter's to recall the raspberry crumble. Crofter's demanded reimbursement from Tradin for the purchase price of the raspberry crumble.

B. The Maryland Policy

Maryland issued policy no. PAS36242205 issued to Tradin Organics for the period April 17, 2004 until nonrenewed/cancelled (the "Maryland

Policy"). The Policy contains the following business risk provision/exclusion:

> k. **Damage to Your Product**
>
> "Property damage" to "your product" arising out of it or any part of it.

Under the Policy "your product" means:

> a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
>
> (1) You;
>
> (2) Others trading under your name; or
>
> (3) A person or organization whose business or assets you have acquired;...
>
> "Your product" includes:
>
> (a) Warranties or representations made at any time with

> respect to the fitness, quality, durability, performance or use of "your product".

C. Tradin's Tender of Crofter's Claim to Maryland

After receiving notification from Crofter's in March 2004 of the contamination and recall of the product, Tradin's insurance broker The Proctor Agency ("Proctor") placed Maryland on notice of the loss. Proctor forwarded the recall notice, Crofter's demand letter and damages spreadsheet to Maryland in or about May 2004. By letter dated May 11, 2004, Maryland denied coverage to Tradin for the loss. Maryland relied on several exclusions in the Policy including the exclusion for property damage to "your product."

D. Tradin Concedes It Sold the Raspberry Crumble to Crofter's

In the courts below, Tradin admitted it was in the business of importing organic fruit products and sold the contaminated raspberry crumble to Crofter's. Both principals of Tradin in the relevant timeframe, Steven Snyder and Gerard Versteeghe, stated repeatedly at deposition that Tradin sold the raspberry crumble to Crofter's.

E. The Decisions Below

The United States District Court for the Southern District of New York granted Maryland summary judgment holding that the claim was excluded from coverage under the policy's "your product" exclusion. The United States Court of Appeals for the Second Circuit issued a summary order of affirmance. Neither decision is officially published.

REASONS FOR DENYING THE PETITION

POINT I

THE TIME THAT THE CONTAMINATION OCCURRED IS IRRELEVANT

Tradin's claim that because the product became contaminated when in the possession of Den Juro, the exception to "your work" exclusions applies is patently lacking in merit. Tradin sold a contaminated or compromised product which caused damages to the buyer Crofter's. When the contamination occurred is of no legal moment. Tradin has failed to identify a single case which holds the time of contamination is the deciding factor for coverage under the "your product" exclusion. The cases cited by Maryland infra, that apply the "your product" exclusion identify product damage at various intervals. None of those cases found the time of the contamination a relevant factor in the coverage analysis. Rather, the operative issue is that the insured sold a defective product.

POINT II

AS TRADIN UNDENIABLY SOLD THE CONTAMINATED RASPBERRY CRUMBLE, THE "YOUR PRODUCT" EXCLUSION IS FULLY APPLICABLE

The application of the "your product" exclusion to Tradin's claim for coverage is aptly illustrated in the two primary cases relied upon by the Second Circuit and District Court. In a strikingly similar

case, Hartog Rahal Partnership v. American Motorists Ins. Co., 359 F.Supp.2d 331 (S.D.N.Y. 2005), Hartog sold apple juice concentrate to prominent food manufacturers such as Smucker's and Tropicana. Apparently, the concentrate contained an artificial sweetener which rendered the product unsaleable. Hartog negotiated settlements with the manufacturers of the product including the price paid for the concentrate. Hartog then sought recovery of $814,350.57, the value of the concentrate sold to the manufacturers, from Kemper Insurance Company ("Kemper"). Kemper refused to reimburse Hartog for the cost of the concentrate citing the exclusion in its policy for "property damage to 'your product' arising out of or any part of it". (Id. at p. 332).

The district court granted Kemper summary judgment and held Hartog's claim fell precisely within the "your product" exclusion. No dispute existed that Hartog sold the concentrate and the recovery sought was for the cost of the product the purchasers paid to Hartog and for which Hartog reimbursed. In denying coverage, the court reasoned the Kemper policy was a "liability policy, not a performance bond". (Id. at p. 332). The same analysis applies here.

A seminal case on the "your product" exclusion is Lowville Producer's Dairy Cooperative, Inc. v. American Motorists Insurance Co., 198 A.D.2d 851, 604 N.Y.S.2d 421 (4th Dept. 1993). In Lowville, a cooperative association of dairy farmers supplied milk to a cheese manufacturing plant operated by Kraft Foods. Apparently, a dead mouse was trapped in a filter hose leading from a Lowville truck into one of Kraft's silos. Kraft determined the milk was contaminated and rejected the entire shipment.

Lowville's insurance carrier denied the insured's claim to cover the loss of the milk itself invoking the "your product" exclusion in the policy. Finding no coverage for the loss, the Lowville Court wrote that the exclusion:

> is intended to exclude coverage for damages to the insured's product, but not for damage caused by the insured's product to persons or property other than the insured's own product ... The policy was clearly intended to cover the possibility that the insured's product, once sold, would cause ... damage to property other than the product itself ... . The risk that the insured be required to make good on its warranty of quality was a contractual or commercial risk that defendant [insurer] did not intend to insure ... . It is a liability policy, not a performance bond.

(Id. at pp. 423-424).

Other courts around the country have reached similar holdings. See Watts Industries, Inc. v. Zurich American Ins. Co., 121 Cal.App. 4th 1029, 18 Cal.Rptr.3d 61 (2d Dist. 2004); see also Todd

Shipyards Corp. v. Turbine Service, Inc., 674 F.2d 401 (5th Cir. 1982); Goodyear Rubber & Supply Co., Inc. v. Great American Insurance Co., 471 F.2d 1343 (9th Cir. 1973); Reston Casualty & Surety Co. v. Polar Panel Co., 457 F.2d 957 (8th Cir. 1972); Sturges Manufacturing Co. v. Utica Mutual Ins. Co., 37 N.Y.2d 69, 371 N.Y.S.2d 444 (1975).

The Second Circuit correctly held that the instant action is on all fours with the above precedent and warrants the same result. It is uncontested that Tradin was both a handler and seller of the raspberry crumble. See e.g., Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 667 N.Y.S.2d 982 (1997) (New York Court of Appeals held the term "handle" does not have to refer to touching the product in connection with the "your product" exclusion. The term "handle" used with the words "manufacturer" and "seller" in the same clause should be given a commercial connotation and construed to refer to products in which the insureds trades or deals). Tradin is a purveyor of organic food products and sent the contaminated raspberry crumble into the stream of commerce. See Todd Shipyards Corporation v. Turbine Service, Inc., 674 F.Supp. 401 (5th Cir. 1982) (stating the handling of goods and products means to "deal" or "trade in" rather than to "touch"). Here, Tradin seeks to recover its reimbursement to Crofter's for selling tainted raspberry crumble. Longstanding principles of insurance law reject such a claim.

POINT III
EXCLUSIONS IN AN INSURANCE POLICY ARE READ INDEPENDENTLY AND NOT COLLECTIVELY

Tradin admits that its loss is within the ambit of the "your product" business risk exclusion in the Maryland Policy. Tradin's contention that all exclusions cited in Maryland's disclaimer letter or Policy and more specifically the "your work" exclusion must apply or none apply is unsupported by a single case or insurance treatise. In fact, the opposite is true: Any one exclusion operative under a policy permits the insurer to deny coverage. To accept Tradin's novel rationale would encourage insurers not to list exclusions in a disclaimer or its policy because if any exclusion does not apply, then coverage would be found.

It has long been the rule that exclusions must be read seriatim and not cumulatively. If any one exclusion applies, no coverage exists in an insurance policy. See Zandri Construction Co., Inc. v. Firemen's Insurance Co. of Newark, 81 A.D.2d 106, 440 N.Y.S.2d 353 (3d Dept. 1981); Zandri Construction Co., Inc. v. Stanley H. Culkin, 54 N.Y.2d 999, 446 N.Y.S.2d 45 (1981); Sampson v. Johnston, 272 A.D.2d 956, 708 N.Y.S.2d 210 (4th Dept. 2000); Sampson v. Johnston, 272 A.D.2d 956, 708 N.Y.S.2d 210 (4th Dept. 2000); Hartford Accident & Indemnity Co. v. A.P. Reale & Sons, Inc., 228 A.D.2d 935, 644 N.Y.S.2d 442 (3d Dept. 1996); see also New York Pattern Jury Instructions Section 4:45 at p. 839 (2007).

A recent District Court decision relied upon this well-entrenched rule in finding in favor of an insurer. See Cogdill v. American General Assurance

Company, 2009 WL3261556 (D.S.C. Oct. 8, 2009) (holding that if any individual exclusion in an insurance policy bars a claim, it will operate to preclude recovery of benefits by the insured regardless of the contents of any other exclusions); see United National Insurance Company v. Hydro Tank, Inc., 497 F.3d 445 (5th Cir. 2007) (exclusions are read independently and not collectively); see also Weedo v. Stone E-Brick, Inc., 81 N.J. 233, 405 A.2d 785 (N.J. 1979) (if any one exclusion applies, there is no coverage).

The Maryland Policy lists sixteen different exclusions which, if applicable, act to deny coverage. Each exclusion must be considered independent of another. J.G.A. Const. Corp. v. Charter Oak Fire Ins. Co., 66 A.D.2d 315, 414 N.Y.S.2d 385 (4th Dept. 1979) is instructive. In J.G.A., the court found the "your work" exclusion inapplicable because the defective construction was performed by a subcontractor of the named insured's general contractor. Nevertheless, the court held in favor of the insurer on the grounds the "your product" exclusion applied. Tradin has failed to address, let alone rebut this basic precept of insurance contract law.

POINT IV

THE "YOUR WORK" AND "YOUR PRODUCT" EXCLUSIONS MUST BE READ/ANALYZED INDEPENDENTLY

Tradin's effort to create ambiguity between the "your product" and "your work" exclusions is meritless. The federal courts have rejected attempts

by an insured seller of a defective product to circumvent the "your product" exclusion by arguing the damage arose out of a subcontractor's work. See United Capitol Insurance Company v. Special Trucks, Inc., 918 F.Supp 1250 (N.D. Ind. 1996). In United Capitol, the insured Special Trucks manufactured a truck chassis sold to Pacific Utility. The truck crashed and damaged the chassis. Pacific sued Special Trucks claiming the crash damage was the result of a faulty wheel placed on the truck by Special Trucks. United Capitol denied coverage to Special Trucks based on the "your product" exclusion. That is, Special Trucks manufactured and sold the truck chassis. Special Trucks claimed the wheel that broke and caused the accident was purchased from a third-party vendor (FIC, Inc.) and that vendor constituted a subcontractor. Thus, Special Trucks claimed the exception to the "your work" exclusion applied to afford coverage. The district court rejected Special Trucks' argument and found for United Capitol.

The United Capitol court first dismissed Special Trucks' claim that the terms "work" and "product" are synonymous and can be applied interchangeably. The court held no case expressly holds that the two exclusions are essentially read as one or the presence of both in an insurance policy creates an ambiguity. (Id. at p. 1256.)

The United Capitol also differentiated between the terms "work" and "product". The term "work" refers to the negligent or incorrect manner in which a job is done. "Product" means that the item made or sold is somehow itself defective or deficient. Utilizing these definitions in this case, Tradin did not perform any work on the raspberry crumble. At most, Den Juro was a vendor that supplied the product to B/V.

Tradin sold defective product for which Crofter's sought to recover its contract price. This is a pure economic claim. As one commentator has succinctly explained:

> The risk intended to by insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself and for which the insured may be found liable. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic work because the product or completed work is not that for which the damaged person bargained.

Henderson Insurance Protection for Products Liability and Completed Operations: What Every Lawyer Should Know, 50 Neb. Rev. 415, 441 (1971). Other circuit courts are in accord. See also Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. V. Liberty Mut. Ins. 234 Fed. Appx. 190 (5th Cir. 2007); Modern Equipment Co. v. Cont'l Western Ins. Co., Inc., 355 F.3d 1125, 1129, 1131 (8th Cir. 2004).

The precedent Tradin relies upon in its Petition does not support an ambiguity argument. Most compelling, Tradin has not identified a single case which has deemed the "your product" exclusion ambiguous. Rather, Tradin's cases held that an ambiguity existed solely in the "your work" exclusion due to the lack of a definition of "subcontractor" under the exception to that exclusion. For example, in Wanzek Construction Inc. v. Employers Insurance of Wausau, 679 N.W.2d 322 (2004), Wanzek was a general contractor for construction of a municipal swimming pool. Wanzek incurred damages in replacing the pool's coping stones manufactured by a subcontractor Aquatic Designs, Inc. ("Aquatic"). Wanzek sought coverage from Wausau for costs incurred. Wausau denied coverage citing the "your work" and "your product" business risk exclusions in the Wausau policy. The Minnesota Supreme Court held that Aquatic fulfilled the subcontractor exception to the "your work" exclusion and conferred coverage on Wanzek.

The Wanzek court rejected Wausau's reliance on the "your product" and "your work" exclusions based upon the exceptions to each exclusion rather than ambiguity or tension between the exclusions. Wanzek found the "your product" exclusion did not apply because the policy defined "your product" as "any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by...you". (Emphasis supplied). Wanzek erected a swimming pool on land. For this reason, the Wanzek court deemed the "your product" exclusion inapplicable. In stark contrast, the contaminated raspberry crumble sold by Tradin is not real property under any circumstance. Thus, the real property

exception in the "your product" exclusion of the Maryland Policy has no relevance.

Wanzek also declined to apply the "your work" exclusion because Aquatic qualified as a subcontractor within the meaning of the exception to the exclusion. Wanzek reasoned the "your work" exclusion ambiguous because the Wausau policy did not define a subcontractor. Wanzek thus held that where a supplier custom fabricates materials to an owner's specifications and provides onsite services in connection with the installation, the supplier meets the definition of subcontractor under the exception to the "your work" exclusion. As the "your work" exclusion is of no import at bar, the ambiguity finding in Wanzek is not probative.

Tradin's citation in passing to Fidelity and Deposit Company of Maryland v. Hartford Casualty Insurance Company, 189 F.Supp.2d 1212 (D. Kansas 2002) is at best puzzling. Fidelity did not address the "your product" exclusion or find any ambiguity exists between the "your product" and "your work" exclusions.

Tradin's reliance on Houseman Construction Company v. The Cincinnati Casualty Company, 2009 WL 2095994 (W.D. Mich.) is similarly misplaced. In fact, the block quote from Houseman incorporated verbatim in Tradin's Petition is from another case cited within Houseman. Tradin has further not apprised this Court of the actual facts in Houseman. Houseman was the general contractor in construction of a grocery store. Several years after construction was completed, structural defects in the construction caused the foundation to sink. Houseman was sued for damages. Houseman sought coverage from Cincinnati Casualty Company ("Cincinnati").

Cincinnati asserted no duty to defend or indemnify because the damages arose solely from Houseman's own work product. Houseman relied on the "your product" exclusion and "your work" exclusions.

The Houseman Court found the "your product" did not apply because of the real property exception. Real property includes both land and fixtures. The grocery store Houseman erected - real property - was excluded from the definition of "your product".

Evidence existed in Houseman that the store was constructed by subcontractors. The Houseman court thus held the "your work" exclusion did not apply because of the subcontractor exception. Houseman similar to Wanzek did not find any ambiguity between the "your product" or "your work" exclusions. Rather, the "your product" exclusion did not apply due to the real property exception. At bar, the raspberry crumble is neither land, a fixture, a swimming pool nor a grocery store. The crumble is a food product. Tradin sold this food product in a contaminated state, and the resulting claim for recall expenses is therefore excluded.

POINT V
WHILE THE ISSUE IS IRRELEVANT, DEN JURO IS NOT A SUBCONTRACTOR OF TRADIN

This case falls squarely within the "your product' exclusion to the Maryland Policy. Maryland thus asserts it is unnecessary to determine whether Den Juro was Tradin's subcontractor because the "your product" exclusion is unequivocal in its intent and applied to deny coverage to Tradin. The courts below recognized that Den Juro's relationship to

Tradin is academic because the "your product" exclusion, one of sixteen exclusions in the Policy, applied to deny coverage to Tradin. As Tradin's petition however explicitly and erroneously contends that Den Juro was Tradin's subcontractor, Maryland is compelled to refute this unsupportable claim.

To begin with, Tradin has no contractual privity with Den Juro. In actuality, the master contract created contemporaneously with the raspberry crumble transaction, No. 20/14418 #2, is between B/V as "Buyer" and Den Juro as "Seller". The "Application – Form Import – or Transaction Certificate" solely list B/V as Buyer and Den Juro as Seller. B/V purchased and paid for the crumble. Den Juro delivered the product to B/V. Tradin Organics and B/V then entered into separate contracts. Den Juro is not a party to or even mentioned in B/V's contracts with Tradin Organics.

B/V and Tradin are separate companies. Tradin made the settlement payment to Crofter's. B/V is not an insured under the Maryland Policy. Tradin's perceived contractual relationship with Den Juro is wholly lacking in merit.

Nowhere in the Den Juro/BV contract is Tradin listed as an intended third-party beneficiary. The following factors are required to establish third-party beneficiary status: (i) the existence of a valid and binding contract between other parties; (ii) that the contract was intended for his or her benefit; and, (iii) that the benefit to him or her is sufficiently immediate rather than incidental to indicate the assumption by the contracting parties of a duty to compensate him in the benefit is lost. Synovus Bank of Tampa Bay v. Valley National Bank, 487

F.Supp.2d 360, 368 (S.D.N.Y. 2007). Tradin cannot satisfy these criteria as a matter of law.

Undeniably, Tradin is nowhere listed in the Den Juro contract. B/V contracted and paid for the product. Den Juro delivered the product to B/V. B/V arranged for the shipping to Crofter's. To the extent Tradin incurred any damages, its recovery is against B/V. Further proof of Tradin's contrived claim is that upon learning of Crofter's claim, B/V and not Tradin sent demand letters to Den Juro. B/V settled with Den Juro to credit future B/V invoices as a set off for the Crofter's loss.

At most, Tradin was an incidental beneficiary. The courts hold that a third party is not a beneficiary of a sales agreement merely because both contracting parties knew the product would be resold to a third party. Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd., 2007 WL 2059239 (S.D.N.Y. 2007); McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994) (person aspiring to such status must show with special clarity that the contracting parties intended to confer a benefit on him). While a remote purchaser such as Tradin may be an incidental beneficiary of the initial sales contract, it is not a third-party beneficiary absent proof that the parties intended to accord it such status. See Kanematsu-Goshu Ltd. V. MIT Messiniaki Aiglie, No. 83 Civ. 530, 1986 WL 751 at 5 n. 3 (S.D.N.Y. 1986); Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, 795 F.2d 1111, 1117 (1st Cir. 1986). Tradin has made no such showing. Further, a remedy for Den Juro's breach as promisor was not confined to Tradin. Rather, B/V could and did recover the benefit of the bargain from Den Juro. See Maggio v. Leeward Ventures, Ltd., 939 F.Supp. 1020 (E.D.N.Y. 1996) (third-party beneficiary

rights only where it appears that no party other than third party can recover if promisor breaches the contract).

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Maryland respectfully requests this Court deny the Petition.

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